United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLANT

ORIGINAL

76-6044

United States Court of Appeals

For the Second Circuit.

B

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH, and WILLIAM BARTH individually,

Plaintiffs-Appellants,

against

P/S

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFFS-APPELLANTS.

UNITED STATES COURT OF APPEALS
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Table of Contents.

	Page
Statement	1
Issues Presented	1
Facts	2
Argument	5
POINT I. Defendant is liable for maintaining an inherently dangerous condition without exercising a high degree of care	6
POINT II. The duty of care to infant trespassers is correlated to the risk of harm reasonably to be perceived	14
POINT III. The infant plaintiff was not obligated to use any higher degree of care than an child of that age	16
POINT IV. Even assuming the infant plaintiff was contributorily negligent, which she was not, it would not be a defense where the defendant was guilty of wanton or gross negligence	16
POINT V. New York CPLR Sections 1411 and 1413 should be applied retroactively	18
Conclusion	19

TABLE OF CASES.

Page

Beauchamp v. New York City Housing Authority, 12 N. Y. 2d 400 (1963) 7

Braun v. Buffalo General Electric Co., 200 N. Y. 434 (1911) 10

Burrows v. Livingston-Niagra Power Co., 217 App. Div. 206, aff'd 244 N. Y. 548 (1926) 9

Colon, Jr., v. Board of Education, 11 N. Y. 2d 446 14

Collentine v. City of New York, 279 N. Y. 119 11

Galvin v. Jennings, 289 F. 2d 15 17

Godfrey v. The State of Washington, 530 P. 2d 630, 84 Wash. 2d 959 (1975) 18

Healy v. City of New Rochelle, 25 A. D. 2d 446, 266 N. Y. S. 2d 861 (2nd Dept. 1966) 11

Jacques v. Village of Lake Placid, 39 A. D. 2d 163 15

Levene v. City of New York, 309 N. Y. 88 13

Magar v. Hammond, 133 N. Y. 387 17

Manikas v. Carswel, 283 App. Div. 1003, 130 N. Y. S. 2d 602 16

Martinez v. Kaufman-Kane Realty Co., Inc., 34 N. Y. 2d 819 (1974) 6, 14

Mayer v. Temple Props., 307 N. Y. 559, 565, 122 N. E. 2d 909, 913 ..... 7, 8

Page

Morrison v. New York Telephone Co., 277 N. Y. 444 (1938) 10

McGill v. United States, 200 S. 2d 873 (1952) 15

Paterson v. Practor Paint & Varnish Co., 21 N. Y. 2d 447 13

Runkel v. City of New York, 282 App. Div. 173, 138 N. Y. S. 2d 422 (2nd Dept. 1953), on second appeal Runkel v. Homelsky, 286 App. Div. 1101, 145 N. Y. S. 2d 729, aff'd 3 N. Y. 2d 857 (1957) 7

Sheffield v. Yager, 256 App. Div. 748, 11 N. Y. S. 2d 673 16

Soto v. City of New York, 9 N. Y. 2d 683, 212 N. Y. S. 2d 418 13

Tabor v. O'Grady, 157 A. 2d 701 (1960) 16

Wartels v. County Asphalt Inc., 29 N. Y. 2d 372 .... 6, 15, 17

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THE UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFFS-APPELLANTS.

Statement.

Plaintiffs appeal from a judgment entered in favor of the defendant in the United States District Court for the Eastern District of New York after trial before the Honorable Thomas Collier Platt without a jury in a personal injury action. Only liability issues were tried.

The infant plaintiff sustained very serious injuries after falling through an opening in the catwalk of a tower on a public beach which the defendant erected and left unguarded for many years.

Issues Presented.

1. Was the infant plaintiff, age 14 years, guilty of contributory negligence?

2. Was the infant's negligence, if any, a proximate cause of her injuries?

3. Assuming the infant plaintiff was contributorily negligent, was it a defense where the defendant was guilty of wanton or gross negligence in creating a trap?

4. Should New York Civil Practice Law and Rules Sections 1411 and 1413 regarding comparative negligence be applied retroactively to cases tried after September 1, 1975, when the law took effect?

Facts.

The plaintiff, Deborah Barth, 14 years of age, having been born on February 2, 1958, was injured on June 24, 1972 (4), at the beach at Democratic Point, Fire Island. She had walked along the beach to a United States Coast Guard Tower with Eileen Gallagher, Rosalie Rozzo, Allan Peers, Victor Behrend and Robert Castelli (6).

She went up the tower by climbing a ladder after lifting herself onto the concrete base. At the top of the tower was a square room enclosed by a four-foot high wall. Beyond this wall was a catwalk with a railing running along the catwalk, waist-high (36a, 60a; Plaintiffs' Exhibits in evidence 1, 2, 3, 4 and Defendant's Exhibit A, offered by plaintiff without the ink markings; 32a, 33a, 35a).

There were no signs at the tower nor any fences nor barricades (36a).

Eileen Gallagher, Victor Behrend and Allan Peers also climbed the tower at the same time (37a, 87a, 116a, 117a). After entering the room, the plaintiff went over the wall

onto the catwalk and looked out at the view (37a, 41a, 55a). She then held onto the railing while looking at the view, took a step back to turn around and, as she turned around to complete another step, she fell through the hole on the floor of the catwalk where there was an escape hatch (37a, 38a, 62a). This occurred at about 2:00 P. M.

The plaintiff had never been to this place before and was never told there was a hole on the catwalk; she did not know there was a hole on the catwalk and never saw the hole before she fell (39a, 40a) nor did she see the hole as she climbed the ladder (45a, 49a).

The bottom part of the blackboard used during the trial faced the ocean (47a, 49a).

This tower was not in operation since 1968 and no personnel were assigned to maintain the tower at any point (65a, 66a). Lieutenant Commander William Aliff assumed command of Fire Island in 1968 and he made no inspection while he was commander (63a-66a).

Eileen Gallagher testified she was 13 at the time of the accident (82a). She is not sure where she went on the catwalk (87a). The hole was on the ocean side (88a). She became aware of the hole by walking around the catwalk (88a). She doesn't recall where she was when she walked around (89a). When she spoke to the plaintiff, Miss Gallagher was opposite the ocean side (89a). Plaintiff was on the other side by the hole (89a). Plaintiff was looking at the view (90a).

Miss Gallagher was sitting and watching Allan Peers talking to plaintiff and plaintiff was talking and walking (91a). Miss Gallagher didn't see anyone smoking on the tower (91a). She doesn't recall where the plaintiff was

standing at the time she was talking (92a). The plaintiff was on the side adjacent to the hole (101a, 102a).

Victor Behrend, who was 20 years of age, testified he was in the northeast corner of the catwalk. The opening was on the south side and the plaintiff was in the southeast corner (119a, 125a). He stated the plaintiff took a cigarette from Peers' hand, ran around the catwalk and fell through the hole (121a); that she had been moving from the east side toward the south side where the hole was located and that Peers was not on the catwalk but inside the room at the time (122a).

Behrend further testified he had been up the tower about five times and had seen children there and knew about the hole on the catwalk since about 1969 (124a, 125a, 133a, 134a).

Allan Peers, age 19, testified he visited the tower for many years before the accident with his father and had been there altogether about 200 times since 1961. Also that he had seen the hole in the catwalk at various times while up the tower and as recently as two weeks before the accident of June 24, 1972. During these times there were no signs nor barricades. He saw children climbing the ladder (154a-159a).

After he had been in the room of the tower, he went down for a cigarette but no one had any and no one was smoking. After he returned he saw the plaintiff in the southeast corner of the catwalk fall through the hole as she turned around and took a step back (160a-162a). At the time he was standing up on the floor of the room of the tower and was not on the ladder entering the room, so that he could see the plaintiff when she fell (162a-168a).

Alan Zammit, an engineer employee of defendant testified the hole in the catwalk was about four feet from the easterly edge of the railing, and the wall of the room was four feet high (207a). The radius of the hole was 12 inches (219a) and the blueprint shows the lift holes to lift the hatch cover (221a).

Rosalie Rozzo and Robert Castelli remained on the beach.

Argument.

The infant plaintiff, age 14 years, was not contributorily negligent in falling through the opening on the catwalk of the tower because she did not know it was there and because she had no reason to suspect an opening in the floor of the catwalk and because it was hidden from view as one moved from the northeasterly side of the catwalk to the southerly side as she did (119a, 122a).

The hole was 12 inches in diameter, located on the southerly side of the catwalk behind and close to the southeasterly part of the wall of the room (207a).

Thus, accepting the court's finding that the plaintiff was moving along the easterly side of the catwalk from north to south, her view of the opening was obstructed by the walls of the room and as she makes the turn to the right of the wall the hole is one foot from the edge of the wall at the turn so that there is no opportunity to see the hole especially when there is no reason to suspect the hole. The defendant's engineer Zammit testified the hole in the catwalk was four feet from the easterly edge of the railing and the catwalk was three feet wide.

Thus, the infant plaintiff's proceeding along the easterly side of the catwalk and making a right turn at the end of the room is not contributory negligence proximately causing her injuries.

Furthermore, as stated in the case of *Wartels v. County Asphalt Inc.,* 29 N. Y. 2d 372 on page 380, the situation created by the defendant was so dangerous and its negligence so extreme as to exclude any other proximate cause thus vitiating acts of the other party which might under ordinary circumstances be appraised as contributory negligence.

POINT I.

Defendant is liable for maintaining an inherently dangerous condition without exercising a high degree of care.

In the case of *Martinez v. Kaufman-Kane Realty Co. Inc.,* 34 N. Y. 2d 819 (1974), a fire escape overhung a public way and the plaintiff, 15 years of age, climbed the defective fire escape which collapsed and he fell to the ground. The Court of Appeals said:

> "Since the injury to the infant plaintiff resulted from artificially dangerous condition on defendant's property, the decisive issue was foreseeability of the risk of the accident which resulted in the injury. Under the facts of this case the duty of care owed to the plaintiff could be correlated to the risk of harm reasonably to be perceived, regardless of status whether that of trespasser, licensee or invitee in the traditional sense."

The case at bar is almost identical with the above case except that the case at bar is even stronger on the facts. The New York Law as enunciated by this opinion of the Court of Appeals is controlling as far as the law is concerned.

The risk was obviously foreseeable to the Coast Guard with the children constantly climbing the tower and the risk of harm was great and ever present. A trap was created and the infant plaintiff herein fell into it. She was unaware of this trap.

The following cases further demonstrate that there is liability upon the defendant.

In the case of *Beauchamp v. New York City Housing Authority,* 12 N. Y. 2d 400 (1963), the court stated at page 405 that:

> "The affirmative creation of a trap (*Mayer v. Temple Props.,* 307 N. Y. 559, 122 N. E. 2d 909) or the maintenance of an inherently dangerous article without exercising a high degree of care to prevent foreseeable injury to others (*Kingsland v. Erie County Agric. Soc.,* 298 N. Y. 409, 84 N. E. 2d 38, 10 A.L.R. 2d 1) has been deemed the equivalant of a willful, wanton or intentional act (*Mayer v. Temple Props.,* 307 N. Y. 559, 565, 122 N. E. 2d 909, 913, *supra; Brzostowski v. Coca-Cola Bottling Co.,* 16 A. D. 2d 196, 200-201, 226 N. Y. S. 2d 464, 469-470)."

In the case at bar the defendant maintained an inherently dangerous condition without exercising a high degree of care to prevent foreseeable injury and had been guilty of a wanton, willful act within the meaning of the above case.

In *Runkel v. City of New York,* 282 App. Div. 173, 138 N. Y. S. 2d 422 (2nd Dept. 1953), on second appeal *Runkel v. Homelsky,* 286 App. Div. 1101, 145 N. Y. S. 2d 729, aff'd 3 N. Y. 2d 857 (1957), the court stated at page 176:

"An abandoned open structure which is so rotted and dilapidated that it is in imminent danger of collapse may be said to constitute a trap or an 'inherently dangerous' instrumentality which is in the same class as an explosive substance, inflammable material, a live electric wire or a spring gun. Injury sustained by any person, even though he be a *trespasser,* due to such an inherently dangerous instrumentality, may be said to have been caused by the wanton or intentional or inhuman act of the one responsible for its existence or its removal and will cast him in liability, provided: (a) that care 'commensurate with the risk involved' has not been taken to guard against the injury; and (b) that the accident was 'foreseeable'—as it was here because of the structure's proximity to the public highway" (citing authorities).

"The bringing of an inherently hazardous situation * * * is tantamount to a reckless disregard of the safety of human life equivalent to wilfulness, and in utter heedlessness of care commensurate with the risk involved, the consequence of which may well have been anticipated" (*Mayer v. Temple Properties,* 307 N. Y. 559, 565 (1954).

In *Mayer, supra,* at page 565, the court stated that:

"In *Kingsland v. Erie Co. Agricultural Soc.* (298 N. Y. 409), where a boy was injured by the explosion of a bomb, held at pp. 423-424: 'the fact that the boys may have been trespassers on the fairgrounds is immaterial, since there was sufficient evidence that the article which caused the injury was "inherently dangerous." One who keeps an explosive substance is "bound to the exercise of a high degree of care to so keep it as to prevent injury to others." (*Travell v. Bonnerman,* 174 N. Y. 47, 51.) The degree of care required is commensurate with the risk involved, depending upon such circumstances as the "dangerous character of

> the material" and its accessibility to others, particularly children whose presence should have been anticipated, regardless of whether or not they are trespassers.' (See, also, *Runkel v. City of New York*, 282 App. Div. 173; *French v. Central New York Power Corp.*, 275 App. Div. 238, 277 App. Div. 1157.) Under the particular circumstances here disclosed, we think the courts below were correct in holding defendants responsible for this boy's death."

In *Burrows v. Livingston-Niagara Power Co.*, 217 App. Div. 206, aff'd 244 N. Y. 548 (1926), the defendant was engaged in furnishing electric power to the employer of the plaintiff's intestate. The intestate threw an iron pipe from a third-story window which came into contact with the defendant's uninsulated power line and he received a shock which caused his death. The court said (p. 207):

> "To my mind a mere statement of the fact that the defendant constructed and maintained a naked high power line, carrying 11,000 volts of electricity, along the side of a factory, less than four feet from the building on one end and eight feet on the other, presents a question of fact as to its negligence. I think the decision of this case is controlled by the principle stated in the case of *Braun v. Buffalo General Electric Co.* 200 N. Y. 484), that is: 'Whether the respondent (defendant) in the exercise of reasonable care and foresight, should have apprehended that the premises over which the wires were strung might be so used as to bring people in contact with them, and whether, therefore, it should have guarded against such a contingency.' It was not necessary for the jury to find that the defendant should have apprehended that someone would throw an iron pipe twenty-five feet long from the third-story window and thus cause an injury. It is not essential that the

> defendant should have foreseen the particular consequences which might arise from the construction of the power line in the place where and in the manner in which it was constructed. (*McKenzie v. Waddell Coal Co.*, 89 App. Div. 415, 416; *Lilly v. N. Y. C. and H.R.R.R. Co.*, 107 N. Y. 566, 575.)
>
> "The question is, should the defendant have anticipated, in the exercise of reasonable care, that the line as constructed constituted a menace and danger to people lawfully upon the premises? Is it so unreasonable to say that an employee of the factor might, in some way, cause something to come into contact with the live wire and thereby cause an injury that the court can say as a matter of law that such construction was not negligent?"

In *Braun v. Buffalo General Electric Co.*, 200 N. Y. 434 (1911), referred to in the *Burrows* case as controlling, plaintiff's intestate, while engaged as a carpenter in the erection of a building, took hold of two wires strung and maintained by the defendant across the premises and carrying an electric current of high voltage. In reversing an affirmance of the trial court's dismissal of the complaint, the court said, at page 492:

> "The fundamental and general principle that a company like respondent, if reasonably chargeable with knowledge, or in the exercise of reasonable prudence bound to anticipate, that people may lawfully come in close proximity to its wires either for purposes of business or pleasure, is under obligation to exercise care to keep the latter in a safe condition is abundantly established" (citing authorities).

The liability of the defendant in maintaining an inherently dangerous condition is demonstrated in *Morrison v. New York Telephone Co.*, 277 N. Y. 444 (1938), wherein the court stated at page 449:

> "The duty of care, which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who technically is a trespasser. In such case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the *locus in quo,* the question of duty must come to be determined. *Newark Electric Light & Power Co. v. Garden,* 78 F. 74, 77, writ of certiorari denied, 166 U. S. 722."

As indicated by the cases cited above the courts have recognized liability where the injured is a trespasser, licensee or invitee, where defendant maintains an inherently hazardous condition in disregard of the safety of others.

> "We all agree that there is sufficient evidence from which the jury could find that to leave unguarded and accessible to children, who concededly were in and about the fairgrounds, an explosive such as is here involved, constitutes negligence" (*Kingsland v. Erie County Agr. Soc.,* 298 N. Y. 409, 415).

In *Healy v. City of New Rochelle,* 25 A. D. 2d 446, 266 N. Y. S. 2d 861 (2nd Dept. 1966), an infant, concededly a trespasser on defendant's premises, was drowned when he fell through the ice on a swimming pool, in the rear of the premises. In affirming a jury verdict in favor of the plaintiff, the court stated that:

> "It is our opinion that the failure to comply with the Board of Appeals' direction with respect to the fence and gate was some evidence of negligence which the jury could take into consideration with all the other evidence on the subject (cf. *Major v. Waverly & Ogden, Inc.,* 7 N. Y. 2d 332, 336, 197 N. Y. S. 2d 165, 168 N. E. 2d 181, 183;

> *Conte v. Large Scale Development Corp.*, 10 N. Y. 2d 20, 217, N. Y. S. 2d 25, 176 N. E. 2d 53) and that, under the facts and circumstances presented, the jury could properly find that appellants' failure to comply with that requirement was tantamount to the infliction of intentional, willful and wanton injury and the creation of a trap, subjecting them to liability even to a trespasser" (citing authorities).

In the case of *Collentine v. City of New York*, 279 N. Y. 119, a boy climbed on the roof of a building in the park which had no railings or fence around the roof. He fell from the roof when he tripped over an iron bar. The City asserted the building was no longer used for park purposes and the entrances were closed and the boy was a trespasser.

The court stated there was evidence from which it might be found that there was a clear invitation, expressed or implied, to the children in the park to run up the steps of the building and play on the roof. The court held they were not trespassers or mere licensees as a matter of law. The mere fact there were no playground facilities on the roof or that the iron bar extended and could be seen and did not constitute a trap did not change the result.

The court also stated on page 125:

> "In deciding what would be reasonable care under the circumstances, the jury were entitled to take into consideration the well known propensities of children to climb about and play (*Parnell v. Holland Furnace Co.*, 234 App. Div. 567, aff. 260 N. Y. 604). That rule applies even though a child might be deemed technically a trespasser (*Connell v. Berland*, 233 App. Div. 234, aff. 248 N. Y. 641)."

In the case of *Levine v. City of New York*, 309 N. Y. 88, a child was injured climbing on a broken and twisted railing on a public stairway and the city was held liable.

In *Soto v. City of New York*, 9 N. Y. 2d 683, 212 N. Y. S. 2d 418, the roof of a condemned building had an unfastened door which made it possible for children to reach the roof. A loose brick from the chimney caused a child to fall and was held for a prima facie case was made out. The child, in this case, was a trespasser.

The case of *Paterson v. Practor Paint & Varnish Co.*, 21 N. Y. 2d 447, the infant plaintiff entered the defendant's yard, picked up a can containing fluid which had dropped from a pipe, lighted a fire and threw the fluid into the fire and he was burned. The court held that a question of fact was presented to the jury as to the defendant's liability.

It stated at page 450:

> "* * * The 'trespass theory' applied to children injured by dangerous conditions on land of owners having notice of the presence of children and the existence of danger has lost force as the law in New York has developed."

It further stated page 451:

> "* * * It will be observed that in each of these cases the injured child was in greater or lesser degree a 'trespasser' in the classic sense that he had no right to be there, but this alone was not held a sufficient ground to bar recovery. Thus the court has moved away from an automatic and literal application of the trespass doctrine to the children injured by dangerous conditions on land."

The court further stated on page 453:

> "The main body of the decisions in this Court instructs us that the rule today is that if the owner of land leaves it open and accessible to children; if he knows that children use it for play; and if he leaves accessible to them highly volatile substances, a case prima facie is made out if a child is thus injured."

In *Colon, Jr., vs. Board of Education,* 11 N. Y. 2d 446, 230 N. Y. S. 697, the Court of Appeals stated:

> "Acts of omission, of course, constitutes active negligence as well as acts of commission, where there is an affirmative duty to act (*Bush Terminal Bldgs. Co. v. Lukenbach, S.S. Co.,* 9 N. Y. 2d 426, 430; *McFall v. Compagnia Mar Blge,* 304 N. Y. 314; *Putvin v. Buffalo Elec. Co.,* 5 N. Y. 2d 447)."

POINT II.

The duty of care to infant trespassers is correlated to the risk of harm reasonably to be perceived.

In the case of *Martinez v. Kaufman-Kane Realty Co. Inc.,* 34 N. Y. 2d 809 (1974), the Court of Appeals unanimously stated that the decisive issue was foreseeability of the risk of the accident which resulted in the injury, and further stated that the duty of care owed to the plaintiff could be correlated to the risk of harm reasonably to be perceived, regardless of the status, whether that of trespasser, licensee or invitee in the traditional sense.

It was certainly foreseeable that children would climb the tower. The defendant is held liable for not only what it knew but should have known.

In the case of *McGill v. United States*, 200 S. 2d 873 (1952), an infant plaintiff fell from a tower on a beach. A no trespassing sign was put up but disappeared. No actual notice was given to Coast Guard.

The Circuit Court reversed the lower court and held the defendant liable. The court stated on page 875 as follows:

> "The risk here was great. The precaution taken to prevent recovery would have been very slight. In fact, we were advised at the argument of this case, that the tower had been taken down, removed and set up elsewhere. Since, under the Tort Claims Act, the United States is responsible in the same way an individual would be, there seems to us no doubt about the liability."

Also, see *Jacques v. Village of Lake Placid*, 39 A. D. 2d 163, where there was a lack of visible barriers marking the forbidden area.

In the case of *Wartels v. County Asphalt, Inc.*, 29 N. Y. 2d 372, the court stated on page 380:

> "Second, the highly dangerous condition created by negligence in an excessive degree and posing a sudden, not to be anticipated peril, reduced plaintiff's burden of proof close to the vanishing point. It is sometimes helpful to recall fundamental doctrine, however trite the reiteration, and in this case the evaluation of the claim of contributory negligence quite naturally evokes the Palsgraf homily: 'The risk reasonably to be perceived defines the duty to be obeyed.' (248 N. Y. 339, 344.)

> In some cases, the situation created may be so dangerous and the negligence of the party creating it so extreme as to exclude any other proximate cause, thus vitiating acts of the other party which might under ordinary circumstances be appraised as contributory negligence."

POINT III.

The infant plaintiff was not obligated to use any higher degree of care than a child of that age.

The infant child is merely held to the degree of care commensurate with her age and capacity (*Sheffield v. Yager,* 256 App. Div. 748, 11 N. Y. 2d 673).

In *Manikas v. Carswel,* 283 App. Div. 1003, 130 N. Y. S. 2d 602, the court held that the infant plaintiff who is 15 years old was only required to exercise the degree of care which would be reasonably expected of an infant of similar age and experience under similar circumstances.

POINT IV.

Even assuming the infant plaintiff was contributorily negligent, which she was not, it would not be a defense where the defendant was guilty of wanton or gross negligence.

In *Tabor v. O'Grady,* 157 A. 2d 701 (1960), the court stated on page 707:

> "It is the settled rule of this and other jurisdictions that contributory negligence is not available as a defense when the defendant has been guilty not merely of negligence but of wanton or willful misconduct." Citing Restatement Torts Section 482.

In *Magar v. Hammand,* 133 N. Y. 367, the court stated on page 392;

> "Contributory negligence is not a defense to a willful or wanton wrong. (*Remers v. LIRR Co.,* 48 Hun 352, aff'd on opinion below 133 N. Y. 669; *Lannen v. Albany Gas Light Co.,* 44 N. Y. 459; *Kaim v. Larkin,* 56 Hun 79; Thompson on Negligence, Secs. 206, 247.)"

To the same affect is *Galvin v. Jennings,* 289 F. 2d 15.

In the case of *Wartels v. County Asphalt, Inc.,* 29 N. Y. 2d 372, the court stated on page 380:

> "Second, the highly dangerous condition created by negligence in an excessive degree and posing a suiden, not to be anticipated peril, reduced plaintiff's burden of proof close to the vanishing point. It is sometimes helpful to recall fundamental doctrine, however trite the reiteration, and in this case the evaluation of the claim of contributory negligence quite naturally evokes the Palsgraf homily: 'The risk reasonably to be perceived defines the duty to be obeyed.' (248 N. Y. 339, 344.) In some cases, the situation created may be so dangerous and the negligence of the party creating it so extreme as to exclude any other proximate cause, thus vitiating acts of the other party which might under ordinary circumstances be appraised as contributory negligence."

POINT V.

New York CPLR Sections 1411 and 1413 should be applied retroactively.

New York Civil Practice Law and Rules as amended by Chapter 69 Laws of 1975, Section 1411, which provides as follows:

> "§1411. *Damages recoverable when contributory negligence or assumption of risk is established.*
>
> "In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."
>
> "§1413. *Applicability.*
>
> "This article shall apply to all causes of action accruing on or after September first, nineteen hundred seventy-five."

The above section should be applied retroactively by the court.

In the case of *Godfrey v. The State of Washington*, 530 P. 2d 630, 84 Wash. 2d 959 (1975), a similar statute went into effect April 1, 1974. The court held that it applied to cases which occurred prior to the effective date where the cases have not yet been decided.

On page 631 the court states:

> "A defendant has no vested right in a tort defense, the merits of which are not determined until a subsequent trial and upon which he did not and could not have relied at the time the accident happened. *Fussner v. Andert,* 261 Minn. 347, 361, 113 N. W. 2d 355 (1961); see also *Gelbman v. Gelbman,* 23 N. Y. 2d 434, 297 N. Y. S. 2d 529, 245 N. E. 2d 192 (1969). Further, such a right does not rise to any higher status by the mere passage of time."

To deny plaintiff the benefit of the said sections would deny her the equal protection of the law and would be discriminating and thus unconstitutional.

Conclusion.

Based upon the law and the facts, judgment in favor of the defendant should be reversed and judgment entered in favor of the plaintiff.

Respectfully submitted,

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